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BY E-FILING

December 21, 2010

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street, S.W.
Washington, D.C. 20324-0001

**RE: Finance Docket No. 35436, Duncan Smith And Gerald Altizer-
Continuance-in-Control -Eighteen Thirty Group, LLC
And Georges Creek Railway, LLC**

228509

**Finance Docket No. 35437, Georges Creek Railway, LLC
-Operation Exemption-Line of Railroad in Allegany County, MD**

228510

**Finance Docket No. 35438, Eighteen Thirty Group, LLC
-Acquisition Exemption-Line of Railroad in Allegany County, MD**

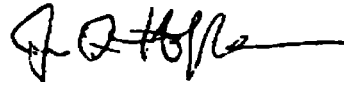
228511

Dear Ms. Brown:

On behalf of Duncan Smith, Gerald Altizer, Georges Creek Railway, LLC, and Eighteen Thirty Group, LLC ("Respondents"), I am e-filing the Joint Reply Comments of Respondents to the "Reply to Comments" each submitted by James Riffin and Lois Lowe on December 1, 2010, and the "Motion to Dismiss for Lack of Jurisdiction" filed by James Riffin on December 8, 2010.

Please address any questions to the undersigned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. D. Heffner', followed by a horizontal line.

John D. Heffner

Enclosures

cc: All parties on service list

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35436

**DUNCAN SMITH AND GERALD ALTIZER
CONTINUANCE-IN-CONTROL
VERIFIED NOTICE OF EXEMPTION
UNDER 49 CFR §1180.2(d) (2)**

STB FINANCE DOCKET NO. 35437

**GEORGES CREEK RAILWAY, LLC
—OPERATION EXEMPTION—
LINE OF RAILROAD IN ALLEGANY COUNTY, MD**

STB FINANCE DOCKET NO. 35438

**EIGHTEEN THIRTY GROUP, LLC
—ACQUISITION EXEMPTION—
LINE OF RAILROAD IN ALLEGANY COUNTY, MD**

**JOINT REPLY COMMENTS OF DUNCAN SMITH,
GERALD ALTIZER, GEORGES CREEK RAILWAY, LLC,
AND EIGHTEEN THIRTY GROUP, LLC**

Submitted By:

John D. Heffner
John D. Heffner, PLLC
1750 K Street, N.W.
Suite 200
Washington, D.C. 20006
(202) 296-3333

Dated: December 21, 2010

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SURFACE TRANSPORTATION BOARD**

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INTRODUCTION

Duncan Smith, Gerald Altizer, Eighteen Thirty Group, LLC, and Georges Creek Railway, LLC (hereafter “Respondents”) submit this reply to the various replies and motions dated December 1 and 8, 2010, and filed with the Board by James Riffin and Lois Lowe (hereafter “Riffin *et al*”). Respondents urge the Board to reject the replies as impermissible under the Board’s Rules of Practice and to reject the Motions as late-filed and without any substantive basis.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

This proceeding dates back to October 19, 2010, when Respondents Eighteen Thirty Group, LLC (“Eighteen Thirty”) and Georges Creek Railway, LLC (“Georges Creek”), filed two class exemption notices with the Surface Transportation Board (“the Board”) for the permissive acquisition and operation, respectively, of about 8.54 miles of railroad extending between Morrison, MD, milepost BAI 27.0, and Carlos, MD at the end of the line, milepost BAI 18.46, all in Allegany County, MD (the “Line”). Respondents represented that Mark Friedman, the bankruptcy trustee for the estate of James Riffin, owns the equitable interest in the Line and has the power to sell the Line subject to court approval. In addition, Eighteen Thirty’s and Georges Creek’s owners Duncan Smith and Gerald Altizer submitted a class exemption notice under 49 CFR 1180.2(d)(2) to enable them to continue-in-control of those entities. Finally Eighteen Thirty also filed an individual petition for exemption with the Board seeking an exemption from certain provisions of 49 U.S.C. 10904(f) (4) (A) to enable it to acquire the Line.¹

Subsequent to Respondents’ exemption filings, Riffin *et al* submitted “Comments” and a Motion to Consolidate on November 3, 2010, followed by a “Motion to Stay and Motion to Revoke” on November 8, incorporating these

¹ That provision forbids an entity acquiring a rail line under the Offer of Financial Assistance procedures from transferring that line to any entity other than the abandoning carrier from which it was originally purchased the line [CSX Transportation in this case] prior to the end of the fifth year after consummation of the sale.

comments by reference. After the Board duly served notices of the three class exemptions on November 4, 2010, it served an additional decision on November 17, rejecting the stay requests filed by Riffin *et al*. Now in what seems like a never ending series of pleadings, Riffin *et al* filed yet more paper with the Board. On December 1, Mr. Riffin and Ms. Lowe each filed a “Reply to Comments” to Respondents’ November 17 comments. And then again on December 8, Mr. Riffin individually filed a “Motion to Dismiss for Lack of Jurisdiction” the three class exemption proceedings.

ARGUMENT

The Board must reject the December 1 “Reply to Comments” as an impermissible reply to a reply. The Board’s Rules of Practice at 49 CFR 1104.13(c) provide very simply “a reply to a reply is not permitted.” Riffin *et al* appears to assert some of the same things they raised before or could have asserted but did not. On November 3 and 8 Riffin *et al* responded to Respondents’ filings raising substantive matters as well as challenging the undersigned counsel’s ability to represent Respondents.² Now they raise the same issues. Mr. Riffin again characterizes as misrepresentations Respondents’ prior statements regarding the entity that would be transferring to Eighteen Thirty the common carrier rights and

² To the extent it is even relevant it was Gerald Altizer that engaged the undersigned counsel to represent the West Virginia entity Western Maryland Services LLC (initially identified as WMS LLC, a West Virginia LLC) and who paid the initial legal fees.

obligations associated with the Line. Mr. Riffin once again attempts to explain why WMS LLC, the Maryland entity he established after-the-fact, did not record the deed. Finally, Riffin *et al* cites for the first time a two-year old Board decision dealing with the transfer of real state and track to the Maryland Transit Administration without the need for agency approval. Presumably, he cites this case as support for the unauthorized transfer of interests in the Line to Ms. Lowe and others. The Board should disregard this filing.

The Board should likewise reject as late-filed the “Motion to Dismiss for Lack of Jurisdiction” that Riffin individually submitted on December 8. The Board’s Rules of Practice provide:

“[A] party may file a reply or motion addressed to any pleading within 20 days after the pleading is filed with the Board, unless otherwise provided.”
49 CFR 1104.13(a).

Inasmuch as Riffin filed this Motion roughly 30 days after it would have been due and provided no explanation for that delay, it should likewise be rejected as noncompliant with 49 CFR 1104.13(a).

Substantively, Riffin’s Motion to Dismiss fails as well as it is based upon several misconceptions of Board and Interstate Commerce Commission law regarding the abandonment, acquisition, and operation of rail lines. Applying a strained interpretation of the law, Mr. Riffin would have the Board find it lacks jurisdiction and therefore must dismiss one or more of Respondents’ exemption

notices because 1) CSX Transportation consummated the abandonment of the Line, 2) upon consummation the Board lost jurisdiction over the Line and cannot exempt these transactions, 3) the Line is now a “private railroad” outside the Board’s regulatory jurisdiction, 4) neither Western Maryland Services, LLC, nor WMS, LLC, is a “rail carrier” under the Board’s jurisdiction, and 5) the Board cannot enjoin Riffin from salvaging the railroad or transferring interests in the Line to others. Then, in a remarkable and sudden reversal of position, Mr. Riffin claims he is a “rail carrier” by reason of the maintenance that he has performed on the Line, the “control” he has exercised over the Line, and some unspecified activities which he believes demonstrate a “holding out” as to the Line. Riffin Motion at 7-11, 13. It is inconceivable how Riffin can suddenly become a “rail carrier” after substituting himself for either Western Maryland Services, LLC, or WMS, LLC, which he claims are “noncarriers.”

Riffin’s first misconception is his failure to distinguish between consummating *the sale* with consummating *an abandonment*. On July 10, 2006. CSX Transportation advised the Board and the parties by letter³ that it had consummated *the sale* of the Line to WMS, LLC. It has *never* consummated any abandonment of the Line. Accordingly, the Line remains an “active” railroad subject to Board jurisdiction, not a “private railroad.” Birt v. Surface Transp. Bd.,

³ Copy attached.

90 F.3d 580 (D.C. Cir. 1996) and cases cited therein; Honey Creek Railroad, Inc.—Petition for Declaratory Order, STB Finance Docket No. 34869, STB served June 4, 2008; and Aban. And Discon. Of R. Lines and Transp. Under 49 US.C. 10903, 1 S.T.B. 894, 905 (1996)(imposing the requirement of a letter of consummation in abandonment proceedings). As such, Mr. Riffin cannot salvage the Line or sell interests in it to others such as Ms. Lowe. The only question then is whether it belongs to either Western Maryland Services, LLC, or WMS, LLC, and, in turn, the Riffin bankruptcy estate.

Questions involving property rights are matters outside the Board's jurisdiction to be resolved in state court. Delaware & H.R. Corp. Trackage Agreement Modification, 290 I.C.C. 103, 107 (1953) and The Burlington Northern and Santa Fe Railway Company—Acquisition and Operation Exemption—State of South Dakota, STB Finance Docket No. 34645, STB served Jan. 14, 2005 (holding that contract issues are outside the agency's jurisdiction to resolve). Inasmuch as acquisition authority is merely permissive, the Board can authorize Eighteen Thirty's transaction and leave it to the parties to resolve property rights issues in the appropriate forum. Cf. Lackawanna County Railroad Authority-Acquisition Exemption-F&L Realty, Inc., STB Finance Docket 33905, STB served October 22, 2001 (authority granted by the Board is permissive, not mandatory, and is not dispositive of ownership of the Line). Even if a court were to find that the Line


was never acquired by either Western Maryland Services, LLC, or WMS, LLC. then it remains the property of CSX Transportation. In that case, Eighteen Thirty would merely refile its acquisition class exemption and proceed to closing with CSX Transportation. Accordingly, Riffin's motion provides no basis for dismissal for lack of jurisdiction over the Line.

In a total *non sequitur*, Mr. Riffin suddenly abandons his "rail carrier" status argument and returns to his original thesis that unless and until the Board finds him to be a "rail carrier" there is no rail carrier status associated with the Line and therefor the Board lacks jurisdiction to entertain Eighteen Thirty's acquisition proposal. Riffin Motion at 12.

CONCLUSION

Neither James Riffin nor Lois Lowe in their individual capacities nor Riffin *et al* have shown any basis for the requested relief. The Board should reject these pleadings if, for no other reason, the December 1 Reply to Comments is impermissible under the Board's rules as a reply to a reply and the December 8 Motion to Dismiss is late. To the extent that the Board wishes to reach the merits of the Motion to Dismiss, Riffin has shown no basis for a finding that it lacks jurisdiction.

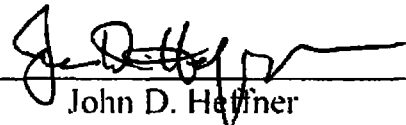
Submitted By:


John D. Heffner
John D. Heffner, PLLC
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Washington, D.C. 20006
(202) 296-3333

Dated: December 21, 2010

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that I have served a copy of the foregoing Reply Comments of Eighteen Thirty Group, LLC, Georges Creek Railway, LLC, Duncan Smith, and Gerald Altizer on all parties to this proceeding by first class U.S. Mail, this 21st day of December 2010.



John D. Heffner

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July 10, 2006

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 700
Washington, D. C. 20423

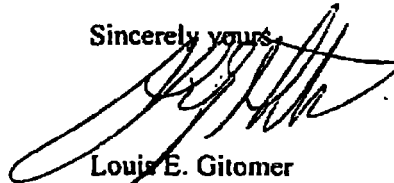
RE: Docket No. AB-55 (Sub-No. 659X), *CSX Transportation, Inc. –
Abandonment Exemption—in Allegany County, MD*

Dear Secretary Williams:

Pursuant to the decision served on December 14, 2005 in the above-entitled matter, on July 10, 2006, CSX Transportation, Inc. consummated the sale to WMS, LLC of the 8.54-mile line of railroad on its Southern Region, Huntington Division East, Georges Creek Subdivision, between milepost BA1 27.0 near Morrison and milepost BA1 18.46 at the end of the track near Carlos, in Allegany County, MD.

This letter is being efiled. Thank you for your assistance. If you have any questions please call or email me.

Sincerely yours,



Louis E. Gitomer
Attorney for: CSX Transportation, Inc.

cc: Mr. Heffner
Mr. Spitulnik